KOO CHEH YEW & ANOR. v. PUBLIC PROSECUTOR

[A.Cr.J. (Arulanandom J.) May 10, 1977]
[Penang — Criminal Appeal No. 149 of 1975]

Customs and Excise — Prohibited goods — Goods from South Africa — Mens rea — Innocent mind — "Knowingly" — Customs Act, 1967, s. 135(1).

This was an appeal from the appellants' conviction for an offence under section 135(1)(a) of the Customs Act. The charge against them were as follows:—

"That you, Koo Cheh Yew and Khoo Chun Woh at about 8.15 a.m. on July 5, 1972 at the Royal Customs & Excise Office, Seberang Prai, were concerned in importing from Cape Town, South Africa, prohibited goods, to wit, 6 'R.Gore & Kallman' pianos, valued at $11,606.86 which are the products of the Union of South Africa, such goods being goods absolutely prohibited on import under the Customs (Prohibition of Imports) Order, 1969, and thereby committed an offence under section 135(1)(a) and punishable under section 135(1)(iii) of the Customs Act, 62/67."

Held, allowing the appeal: the mere fact that the words "knowingly" or "with intent to defraud or import prohibited goods" did not appear in section 135 of the statute creating the offence did not mean that the doors are tightly shut to an accused who establishes to the court from all the circumstances of the cases that he did not have a guilty mind to avail himself of the defence of an innocent mind.

Cases referred to:-

(1) *Frailey* v. *Charlton* [1920] 1 K.B. 147.
(2) *Sweet* v. *Parsely* [1969] 2 W.L.R. 470.
(3) *Lim Chin Aik* v. *Regina* [1963] M.L.J. 50, 52; [1963] A.C. 161.
(4) *R.* v. *Turnbull* [1944] N.S.W. S.R. 108.
(5) *Reg.* v. *Tolson* (1889) 23 Q.B.D. 168.
(6) *Lim Boon Hong & Anor.* v. *Public Prosecutor* (Penang Criminal Appeal Case No. PG. 34/67).

CRIMINAL APPEAL.

Lim Ewe Hock for the appellants.

Ghazi bin Ishak (Deputy Public Prosecutor) for the respondent.

Arulanandom J.: This is an appeal from the decision of the Senior President, Sessions Court, Penang, where the two appellants were convicted for an offence under section 135(1)(a) of the Customs Act (No. 62 of 1967) and sentenced to a fine of $10,000 each or in default one year's imprisonment.

The charge against the two defendants was as follows: —

"That you, Koo Cheh Yew, I.C. No. 1835157 and Khoo Chun Woh I.C. No. 0953647 at about 8.15 a.m. on July 5, 1972 at the Royal Customs & Excise Office, Seberang Prai, were concerned in importing from Cape Town, South Africa, prohibited goods, to wit, 6 'R.Gore & Kallman' pianos, valued at $11,606.86 which are the products of the Union of South Africa, such goods being goods absolutely prohibited on import under the Customs (Prohibition of Imports) Order, 1969, and thereby committed an offence under section 135(1)(a) and punishable under section 135(1)(iii) of the Customs Act, 62/67."

The facts in this case are not in dispute.

The first appellant is the sole proprietor of World Piano Company and has been in the business for over 30 years and was importing pianos from Germany for the last seven years. In the present instance, he received a letter from his dealers in Germany that their pianos would be manufactured in South Africa. Ignorant of the existence of Customs (Prohibition of Imports) Order, 1969 P.U. (A) 426/1969 whereby there was a prohibition on importing goods made in South Africa, the second appellant prepared two Customs Import Declarations (Exhibits P1 & P11) for the importation of six pianos. The country of origin of the pianos was stated in the declarations to be South Africa. Customs officers collected the duty payable on them and released them. Subsequently they realised that the importation was prohibited and seized the goods and as a result the appellants were charged.

All the documents produced by the prosecution in respect of the importation support the view that the appellants did not in any way conceal or attempt to conceal the fact that the country of origin of the goods was South Africa. The Certificate of Origin (Exhibit P4) states so, and so do the Invoices (Exhibit P2), the Bill of Lading (Exhibit P3), the Marine Insurance Policy (Exhibit P5) and the appellants' application for remittance of money under the Exchange Control Ordinance (Exhibit P14). The Customs Declaration also made this clear and in the first instance the Customs Department collected duty on the goods and released them although they subsequently arrested the appellants and seized these goods.

The question of the guilt or innocence of the accused thus becomes purely a matter of law and the section which needs interpretation is section 135 of the Customs Act (No. 62 of 1967).

Section 135 reads as follows: —

"135. (1) Whoever —

(a) is concerned in importing or exporting any uncustomed goods or any prohibited goods contrary to such prohibition whether such uncustomed or prohibited goods be shipped, unshipped, delivered or not; or

(b) ships, unships, delivers or assists or is concerned in the shipping, unshipping or delivery of any uncustomed goods or any prohibited goods contrary to such prohibition; or

(c) illegally removes or withdraws or in any way assists or is concerned in the illegal removal or withdrawal of any goods from any customs control; or

(d) knowingly harbours, keeps, conceals, or is in possession of, or permits, suffers, causes or procures to be harboured, kept or concealed, any uncustomed or prohibited goods; or

(e) is in any way knowingly concerned in conveying, removing, depositing or dealing with any dutiable, uncustomed or prohibited goods with intent to defraud the Government of any duties thereon, or to evade any of the provisions of this Act or to evade any prohibition applicable to such goods; or

(f) being a passenger or other person, is found to have in his baggage or upon his person or otherwise in his possession, after having denied that he has any dutiable or prohibited goods in his baggage or upon his person or otherwise in his possession, any dutiable or prohibited goods; or

(g) is in any way knowingly concerned in any fraudulent evasion or attempt at fraudulent evasion of any customs duty, or in evasion or attempt at evasion of any prohibition of import or export;

shall be guilty of an offence and shall, on conviction —

(i) in the case of goods included in a class of goods appearing in an order made under sub-section (1) of section 11, be liable for the first offence to a fine of not less than ten times the amount of the customs duty or five thousand dollars, whichever is the lesser amount, and of not more than twenty times the amount of the customs duty or five thousand dollars, whichever is the greater amount, and for a second or any subsequent offence to a fine of

not less than ten times the customs duty or five thousand dollars, whichever is the lesser amount, and of not more than forty times the customs duty or ten thousand dollars, whichever is the greater amount, or to imprisonment for a term not exceeding two years or to both such fine and imprisonment;

Provided that when the amount of customs duty cannot be ascertained the penalty may amount to a fine not exceeding five thousand dollars; and

(ii) in the case of uncustomed goods, such goods not being dutiable or prohibited, be liable to a fine not exceeding twice the value of the goods or one thousand dollars whichever is the greater amount;

Provided that where the value cannot be ascertained the penalty may amount to a fine not exceeding one thousand dollars.

(iii) in the case of prohibited goods be liable to a fine of not less than ten times the value of the goods or ten thousand dollars, whichever is the lesser amount and of not more than ten times the value of the goods or ten thousand dollars whichever is the greater amount;
Provided that where the value of the goods cannot be ascertained the penalty may amount to a fine not exceeding ten thousand dollars.

(2) In any prosecution under this section or section 139 any dutiable, uncustomed or prohibited goods shall be deemed to be dutiable, uncustomed or prohibited goods, as the case may be, to the knowledge of the defendant unless the contrary be proved by such defendant."

Although the words are not identical in substance it is similar to section 186 of the Customs Consolidation Act 1876 of England. Section 186 of this Act reads as follows: —

"Every person who shall import or bring or be concerned in importing or bringing into the United Kingdom any prohibited goods or any goods the importation of which is restricted contrary to such prohibition or restriction whether the same be unshipped or not; or shall unship or assist or be otherwise concerned in the unshipping of any goods which are prohibited ... or shall knowingly harbour keep or conceal or knowingly permit or suffer or cause or procure to be harboured kept or concealed any prohibited restricted or uncustomed goods ... or shall knowingly acquire possession of any such goods; or shall be in any way knowingly concerned in carrying removing depositing concealing or in any manner dealing with any such goods with intent to defraud Her Majesty of any duties due thereon or to evade any prohibition or restriction of or applicable to such goods; or shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duties of Customs or of the laws and restrictions of the Customs relating to the importation . unshipping landing and delivery of goods or otherwise contrary to the Customs Acts; shall for each such offence forfeit either treble the value of the goods including the duty payable thereon or one hundred pounds at the election of the Commissioners of Customs."

The only difference is that while in both sections the different types of offences embodied in the sections are punctuated by semi colons, and separated by "or", our section has enumerated the differences by making subsections of each offence but considering the punctuations, this creation of subsections does not materially affect the meaning of the whole section, or its different parts.

Earl *Jowitt's* Dictionary of English Law gives the following definition of "punctuation":—

"Properly drawn deeds are never punctuated, and must be so drawn that their meaning is clear without any marks of punctuation. Punctuation in deeds, if it does occur, is disregarded. Even in Acts of Parliament it is of little importance (*Piper* v. *Harvey* [1958] 1 Q.B. 438)."

Hence in construing our section 135(1) of the Customs Act its meaning cannot be held to be different from section 186 of the Customs Consolidation Act 1876 of England because of its arrangement or punctuation.

In the case of *Frailey* v. *Charlton*[1] it was held that to constitute the offence of "*knowingly* harbouring prohibited goods" under section 186 of the Customs Consolidation Act 1876 it is not enough that the party charged had such goods in his possession with intent to convey them out of the United Kingdom, he must have done so "with intent to evade the prohibition." The respondent, a ship's steward, had on board his ship while lying in the Thames preparatory to her departure for a foreign port a quantity of soap, which was intended for the use of the passengers on the voyage. The export of soap was prohibited by Royal Proclamation, but the respondent was not aware of the fact of that prohibition. On an information against him under the above section for harbouring the soap, it was held that his ignorance of the prohibition afforded a good defence.

In the case of *Sweet* v. *Parsely* (House of Lords)[2] their Lordships considered section 5 of the Dangerous Drugs Act 1965 which reads as follows: —

"If a person — (a) being the occupier of any premises, permits those premises to be used for the purpose of smoking ... cannabis resin ... or (b) is concerned in the management of any premises used for any such purpose as aforesaid; he shall be guilty of an offence against this Act."

Here on the face of it anybody concerned in the management of any premises used for the smoking of cannabis resin would appear to be guilty of an offence whether they knew about it or not.

In this particular case, the headnotes read as follows: —

"The appellant, the sub-tenant of a farmhouse let out several rooms to tenants who shared the use of the kitchen. She herself retained and occupied a bedroom. Later she gave up living there, though she came occasionally to collect letters and rent. On June 11, 1967, quantities of drugs, including cannabis resin, were found in the farmhouse and the appellant was charged with being concerned in the management of premises used for the purpose of smoking cannabis resin, contrary to section 5(b) of this Act. The appellant conceded that the premises had been so used. The prosecutor conceded that she did not know this. She was convicted of the offence.

Held, that the offence created by section 5(b) was not an absolute offence and the conviction should be quashed. The words 'used for the purpose' in section 5(b) refer to the purpose of the management and *mens rea* is an essential ingredient of the offence.

Mens rea is an essential ingredient of every offence unless some reason can be found for holding that it is not necessary, and the court ought not to hold that an offence is an absolute offence unless it appears that that must have been the intention of Parliament.

It is a general principle of construction of any enactment which creates a criminal offence that, even where the words used to describe the prohibited conduct would not in any other context connote the necessity for any particular mental element, they are nevertheless to be read as subject to the implication that a necessary element in the offence is the absence of a belief, held honestly and on reasonable grounds, in the existence of facts which, if true, would make the act innocent."

His Lordship Lord Pearce in the course of his judgment had this to say:

"The notion that some guilty mind is a constituent part of crime and punishment goes back far beyond our common law. And at common law *mens rea* is a necessary element in a crime. Since the Industrial Revolution the increasing

complexity of life called into being new duties and crimes which took no account of intent. Those who undertake various industrial and other activities, especially where these affect the life and health of the citizen, may find themselves liable to statutory punishment regardless of knowledge or intent, both in respect of their own acts or neglect and those of their servants. But one must remember that normally *mens rea* is still an ingredient of any offence. Before the court will dispense with the necessity for *mens rea* it has to be satisfied that Parliament so intended. The mere absence of the word 'knowingly' is not enough. But the nature of the crime, the punishment, the absence of social obloquy, the particular mischief and the field of activity in which it occurs, and the wording of the particular section and its context, may show that Parliament intended that the act should be prevented by punishment regardless of intent or knowledge."

His Lordship Lord Reid in the course of his judgment after considering the question of *mens rea* in absolute prohibition on the intention of the legislature says this:

"It is also firmly established that the fact that other sections of the Act expressly require *mens rea,* for example because they contain the word 'knowingly', is not in itself sufficient to justify a decision that a section which is silent as to *mens rea* creates an absolute offence. In the absence of a clear indication in the Act that an offence is intended to be an absolute offence, it is necessary to go outside the Act and examine all relevant circumstances in order to establish that this must have been the intention of Parliament. I say 'must have been' because it is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted."

and later

"The choice would be much more difficult if there were no other way open than either *mens rea* in the full sense or an absolute offence; for there are many kinds of case where putting on the prosecutor the full burden of proving *mens rea* creates great difficulties and may lead to many unjust acquittals. But there are at least two other possibilities. Parliament has not infrequently transferred the onus as regards *mens rea* to the accused, so that, once the necessary facts are proved, he must convince the jury that on balance of probabilities he is innocent of any criminal intention. I find it a little surprising that more use has not been made of this method: but one of the bad effects of the decision of this House in *Woolmington* v. *Director of Public Prosecutions* [1935] A.C. 462 may have been to discourage its use. The other method would be in effect to substitute in appropriate classes of cases gross negligence for *mens rea* in the full sense as the mental element necessary to constitute the crime. It would often be much easier to infer that Parliament must have meant that gross negligence should be the necessary mental element than to infer that Parliament intended to create an absolute offence A variant of this would be to accept the view of Cave J. in *Reg.* v. *Tolson* (1889) 23 Q.B.D. 165, 181. This appears to have been done in Australia where authority appears to support what Dixon J. said in *Proudman* v. *Dayman* (1941) 67 C.L.R. 536, 540:

'As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what otherwise be an offence.'

It may be that none of these methods is wholly satisfactory but at least the public scandal of convicting on a serious charge persons who are in no way blameworthy would be avoided."

The Privy Council in the case of *Lim Chin Aik* v. *Regina*[3] made some pertinent observations about *mens rea.* Although the case is not on all fours with the present, it would be worthwhile to consider its content. Lord Evershed in delivering the judgment of the court says on page 52:

"Their Lordships return accordingly to the main question. That proof of the existence of a guilty intent is an essential ingredient of a crime at common law is not at all in doubt. The problem is of the extent to which the same rule is applicable in the case of offences created and defined by statute or statutory instrument. Their Lordships were very properly referred to a number of cases, including the oftencited *Nichols* v. *Hall* and *Cundy* v. *Le Cocq,* and covering a considerable period ending with the decision last year of the Court of Criminal Appeal in *Reg.* v. *Cugullere.* As was observed by Wright J. at the beginning of his judgment in the case of *Sherras* v. *De Rutzen,* to which their Lordships will presently make further reference, the difficulty of the problem is enhanced by the fact that many of the cases are not easy to reconcile. Thus it has been held that a licensee of a public house commits an offence under the licensing legislation of serving alcoholic liquor to a drunken man even though he was unaware of the customer's condition (*Cundy* v. *Le Cocq)*: but that a licensee does not commit the offence under the same legislation of serving drinks to a police constable on duty if he reasonably supposed that the constable was in fact off duty (see *Sherras's* case above mentioned): and in the latest case above cited the Court of Criminal Appeal held that the terms of section 1 of the Prevention of Crime Act, 1953, 'Any person who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon shall be guilty of an offence' must be read as if the word 'knowingly' were written before the word 'has.'

Mr. Gratiaen founded his argument upon the formulation of the problem contained in the judgment of Wright J. in *Sherras's* case. The language of that learned and experienced judge was as follows: 'There is a presumption that *mens rea,* or evil intention, or knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered.'

It is to be observed that in that case the court held the presumption not to be displaced even though the word 'knowingly' which was not found in the sub-section involved in the case did appear in another subsection of the same section."

And further on

"There Lordships accept as correct the formulation cited from the judgment of Wright J. They are fortified in that view by the fact that such formulation was expressly accepted by Lord du Parcq in delivering the judgment of the Board in the case in 1947 of *Srinivas Mall Bairoliya* v. *King-Emperor* — a case which unfortunately has not found its way into the Law Reports. That was a case in which one of the appellants had been charged with an offence under the rules made by virtue of the Defence of India Act, 1939, consisting of the sale of salt at prices exceeding those prescribed under the rules, the sales having in fact been made without that appellant's knowledge by one of his servants. The Indian High Court had held the appellant to be nonetheless liable upon the terms of the rules; but the Board rejected the view of the High Court. Lord du Parcq, after citing with approval the judgment already quoted of Wright J., also adopted the language of Lord Goddard C.J., in the case of *Brend* v. *Wood*: 'It is in my opinion of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that unless a statute either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind."

So it would appear that the mere fact that the words "knowingly" or "with intent to defraud or import prohibited goods" do not appear in the section of the statute creating the offence does not mean that the doors are tightly shut to an accused who establishes to the court from all the circumstances of the case that he did not have a guilty mind to avail himself of the defence of an innocent mind.

In the case of *R.* v. *Turnbull*[4] the Australian High Court founding its ruling on a judgment of Cave J. in *Reg.* v. *Tolson*[5] and Wills J. at page 175 evolved a defence of reasonable mistake of fact, and the burden of proving this on a balance of probabilities rests upon the defendant.

Jordan J. in the said judgment states as follows: —

"The general rule as to *mens rea* is clear and plain. It is a well established rule of the common law that an act is not criminal unless it is the product of a guilty mind. Thus, *mens rea* has two elements: (1) a mind; (2) which is guilty. The first is always essential.... Assuming his mind to be sufficiently normal for him to be capable of criminal responsibility, it is also necessary at common law for the prosecution to prove that he knew that he was doing the criminal act which is charged against him, that is, that he knew all the facts constituting the ingredients necessary to make the act criminal were involved in what he was doing. If this be established, it is no defence that he did not know that the act which he was consciously doing was forbidden by law. Ignorance of the law is no excuse. But it is a good defence if he displaces the evidence relied upon as establishing his knowledge of the presence of some essential factual ingredient of the crime charged. In principle, the rule of the common law is just as applicable to acts which are criminal because prohibited by statute, as to those which are offences at common law; and it was said by Cave J., in *R.* v. *Tolson* [(1889), 23 Q.B.D. 168, at p. 181] that it is so applicable unless excluded expressly or by necessary implication."

In the local case of *Lim Boon Hong and Tan Koon Yee* v. *Public Prosecutor*[6] (Penang Criminal Appeal Case No. PG. 34/67) his Lordship Justice H.S. Ong to whom the case of *Frailey* v. *Charlton, supra,* was cited said:

"I feel I must however follow the trend in our own courts (although before a single judge) where when proof of *mens rea or knowledge is essential to a conviction this is specifically stated* in the section or paragraph. I am not entitled to construe the legislation other than as it has been enacted in the absence of ambiguity and accordingly I hold that under section 131(1)(a) an *intent to defraud* the Government of any duties thereon, or to evade any of the provisions of this Ordinance or to evade any prohibition applicable to such goods is not required." (the emphasis is mine).

While I have the highest regard for the views of my brother Ong F.J., on the law to my mind such a legalistic approach without reservation could lead to the conviction and punishment of persons who are in the particular circumstances of a case totally blameless, a situation which would be total anathema to the principles of criminal jurisprudence and the tenets of criminal justice. This is the very mischief which both Lord Reid in *Sweet* v. *Parsley, supra,* and the High Court of Australia in *R.* v. *Turnbull, supra,* thought necessary to avoid.

In the present case the President was quite right in calling for the defence at the end of the prosecution case as to use the reasoning of the Australian High Court decision, the prosecution having proved that the appellants were concerned in importing prohibited goods, the "mind" part of intention, a *prima facie* case had been made out against the appellants.

But once the appellants submitted their defence, that they had no knowledge of the prohibition, then the court on the balance of probabilities should have considered whether the appellants had in importing the goods a "mind which was guilty". It is an age-old maxim that ignorance of the law is no defence but at the same time it would be contrary to principles of justice to convict an innocent person. I am fully aware of the dangers of allowing a defence of lack of knowledge of the law to be accepted and a bare statement to that effect should not suffice in the courts. But if on consideration of all the facts and circumstances of the case the court is satisfied of the "innocent mind" of an accused person, then the court should be entitled to take cognizance of it and act accordingly. In this case first and foremost the appellants were not importing goods which were inherently harmful to society or were of such a nature that they should have been put on their guard and made inquiries as to the lawfulness of their importation. If they were importing drugs, or arms or explosives, then a plea of ignorance of the law would not avail. The appellants' suppliers were from West Germany and it was through them that the pianos were imported from South Africa. From the outset the appellants made no attempt to conceal the fact that the country of origin of the pianos was South Africa. Permission was given by the Foreign Exchange Control to remit money for payment of these goods. In the Customs Declaration they also made no attempt to conceal the country of origin. In fact the Customs authorities collected the duty on them and released the goods. If the principle of "innocent minds" is to be totally cast aside, it could then even be argued that the Exchange Control and the Customs authorities had abetted the offence. But such an approach would make a mockery of law and justice.

For the reasons given above I would allow the appeal and set aside the conviction and sentence. The fine paid by the appellants shall be refunded to them.

As far as the goods are concerned, as their importation is totally prohibited, they shall remain confiscated to the authorities and the loss suffered by the appellants thereby would be a sufficient price to pay for their ignorance of the law. What the authorities do with the goods is not the concern of the courts but one cannot help but conjecture that to destroy the goods would be tantamount to gross waste of valuable assets which could contribute to the development of musical talent in the country but at the same time to auction them to the public would be to permit prohibited goods to be sold in the country.

Order accordingly.

Solicitors: *Lim Ewe Hock.*

CHAN SIEW KIM v. WOI FUNG SHENG TIM MEDICAL STORE & ANOR.

[O.C.J. (Abdoolcader J.) November 30 and December 5, 1977]

[Ipoh — Originating Motion No. 10 of 1976]

Administrative Law — Certiorari — Application to quash order of Appeal Board in respect of quantum of compensation awarded to tenant under provision of s.18 of the Control of Rent Act, 1966 — Privative or ouster clause as opposed to mere finality — Manifest defect of jurisdiction — Control of Rent Act, 1966, ss. 15(1), 16(1)(j) & 18(2).

Landlord and Tenant — Controlled premises — Recovery of possession for purposes of development — Compensation — Subtenant of part of premises entitled to — Tenant receiving from subtenants rents exceeding in the aggregate by more than 10% the rent of whole premises — No prohibition per se and did not render such sub-tenancy illegal — Control of Rent Act, 1966, ss. 15(1), 16(1)(j) and 18(2).

Interpretation — Meaning of 'jurisdiction', 'defect of jurisdiction' and 'manifest'.